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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 53

In the Matter of
TAX SERVICE ASSOCIATION OF ILLINOIS,
Alleged Bankrupt.

ROY G. HARRIS and BENJAMIN F. J. ODELL,
Petitioners,

vs.

AVERY BRUNDAGE COMPANY, et al., and DAHL-STEDMAN CO., et al.,
Respondents.

PETITIONERS' REPLY BRIEF

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These petitioners would have appreciated respondents following the order of petitioners' brief. Undoubtedly, it would have assisted both the Court and counsel. Petitioners' brief listed seven erroneous assumptions of the

District Court, any one of which is fatal to the decision there rendered. It is to be observed that respondents have failed utterly to justify any of these erroneous assumptions.

Respondents' brief is replete with suggestions ranging all the way from mere insinuation to sweeping charges that petitioners have misstated the facts. These are the same suggestions in substance which were made to this Court in the brief supporting respondents' recent unsuccessful motion to dismiss the certiorari. Petitioners discussed such charges in their brief filed in opposition thereto and shall not make the brief unnecessarily lengthy by repetition here. It is believed that mere reference to the record is sufficient to demonstrate the falsity of these charges.

Respondents make use of one device in argument which it may be well to note. They call attention (their brief 13-18) to various statements made in petitioners' brief which are fair inferences from the record, and then, although they do not deny the statements, or point out any reason why they do not constitute fair inferences, they state that we are not justified in making such inferences simply because the matter so inferred does not appear in the record in the exact language which the petitioners employ. In view of the *ex parte* condition of the record, it certainly seems that petitioners should not be denied the benefit of those inferences which naturally and inescapably arise from the literal language of such record.

It is unfortunate enough for petitioners to be denied the opportunity to present their facts in the case. It seems wholly inexcusable for respondents not only to strain and distort the construction of their petitions and of the orders they drafted, but to deliberately misstate those facts, and to allege in argument that facts are in the record when they are not.

Throughout their brief respondents have reiterated the assertion that their petition contained an allegation of the fact that Harris and Odell were agents of the bankrupt. The only allegation in the petition in this respect is as follows:

> "In signing said letter to the National Builders Bank of Chicago aforesaid, dated May 2, 1935, *said Craig, Harris and Odell were acting as the agents and representatives of the petitioners,* and said Craig was also acting as the representative of the Building Construction Employers' Association and the other associations who were 'subscribers' to said agreement of April 9, 1935, and said Odell and Harris were also acting as the agents and representatives of the Tax Service Association of Illinois, the other party to said agreement of April 9, 1935. * * *" (Italics ours.) (Rec. 28.)

This language discloses a relationship of trustee and beneficiary, and not that of principal and agent.

Respondents, in their brief, have again asserted that:

> "On May 3, 1937, an involuntary petition in bankruptcy against the bankrupt was filed and the District Court appointed a receiver. * * * Respondents' petition, filed May 24, 1937, averred all of the foregoing facts. * * *" (Brief for Respondents, pages 5-6.)

There is no such allegation. We previously pointed out to respondents this misconception by them although without avail.

Respondents relate that the bankrupt and Odell instituted a suit for the respondents. The bankrupt was not a party to the tax suit as the *Blome* case in 365 Ill. 456 discloses. This error also has been previously drawn to their attention without avail.

Respondents constantly labor under the impression that petitioners here were agents of the bankrupt. This is

erroneous and quite confusing. The fact remains that Craig, Harris and Odell, as disclosed by the letter to the bank, signed as individuals, not as agents, and the name of the bankrupt does not appear in the letter directly or indirectly and nowhere in the record is there any intimation of the bankrupt's control in any way over the funds in escrow.

Respondents state (pages 14 and 62) that petitioners' statements of the *Blome* and *Herlihy* cases are untrue. We respectfully again point out to the Court the following significant language in the *Blome* case:

> "When sales to the owners are of fabricated materials or equipment, the department may compute the tax on the price of such materials so fabricated, but when materials are furnished to be used to erect or repair a structure, the service involved in such erection or repair does not constitute tangible personal property, or the sale thereof.
>
> The decree of the trial court is erroneous and is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.
>
> *Reversed and remanded.*"

Blome Co. et al. v. Ames, 365 Ill. 456, 459-460.

The receiver in bankruptcy filed his answer in which he stated "that said opinion insofar as it decided that the Department of Finance of the State of Illinois may compute the tax only on the price of materials furnished, was a decision favorable to the petitioners [respondents here] * * * and effected substantial tax savings."

Irrespective of later developments, it cannot be disputed that the $72,000 in question here was money saved to the contractors as a result of the decision procured by Odell in the *Blome* case.

In addition, the Supreme Court of the State of Illinois later voluntarily made a further decision for the contractors who were in the *Blome* case as follows:

"* * * The *Blome* case involved 'contractors who agreed to furnish and install building materials and fixtures, to do excavating, make foundations, erect buildings, and make various kinds of repairs to buildings already built.' It is directly in point here. We have reconsidered in this opinion the reasoning upon which part of that decision rests and no longer feel impelled to follow it. So far as that case applies to construction contractors who furnish labor and materials in excavating for basements, sewers, water mains or other purposes, or in the erection of foundations or buildings, or in the making of various kinds of structural repairs to buildings, the *Blome* case is expressly overruled."

Herlihy v. *Nudelman*, 367 Ill. 600, 605.

As a result of this second decision concerning the contractors in the *Blome* case, they are now entitled to a saving not only of the 25% aforesaid, but to an additional saving of 75% or total of 100% of the amount of money deposited by them in escrow as sales taxes claimed by the State. This total saving is made possible by a special provision in the Retailers' Occupation Tax Act of Illinois as follows:

"Credits or Refunds.

"Section 6. If it shall appear that an amount of tax, penalty or interest has been paid which was not due under the provisions of this Act, whether as the result of a mistake of fact or an error of law, then such amount shall be credited against any tax due, or to become due, under this Act from the person who made the erroneous payment, or such amount shall be refunded to such person by the Department."

Smith-Hurd Illinois Statutes, Chap. 120, Sec. 445.

Throughout the brief respondents stress the fact that their petition contains some allegations with respect to certain books and tax returns. It need only be pointed out that the subject matter of this appeal at all times

has been the funds. There was no ruling by the Court on any alleged books or records. Respondents themselves abandon their claim to the books and records in their so-called "agreed" order. This demonstrates the fact that the allegations were clearly not interposed in good faith but merely for the purpose of creating the appearance of jurisdiction where none in fact existed. (As a matter of fact, the "books" spoken of is a mere "book" and was kept for the convenience of the trustees and as their sole property just as were the copies of tax returns, many of which were made up by and for the trustees. Neither the book, the entries in it nor the copies of the tax returns have value to any one but the trustees. The entries were made on a few pages by and for the trustees and not for anyone else. The book and copies of the returns were not in the possession of the bankrupt but were in the possession of the trustees. (Rec. 26, 31, 32, 33, 35.) Respondents' petition prays that the said book and records be turned over to the respondents. However, the so-called "agreed" order (Rec. 40-1) required respondents to present a list to one of the petitioners—directly contrary to the prayers of their petition.

Respondents state on page 38 of their brief:

> "• • • (1) respondents' petition alleged that the Escrow Fund was held by the bankrupt and that petitioners in their relations to the Fund were the agents of the bankrupt; • • •"

Respondents are again mistaken for there are no such allegations in their petition. On the contrary, it affirmatively appears from their petition that the funds were not under the custody and control of the bankrupt but were under the custody and control of the trustees. In this connection, it is to be noted on page 44 of our main brief we challenged respondents to point out to the court

a single allegation in their Dahl-Stedman petition which states either directly or indirectly that the funds were subject to the control of the alleged bankrupt. Not only do respondents fail to meet this challenge, but they continue to indulge in this misrepresentation.

Respondents dissent (page 13 their brief) from petitioners' construction of the contract between the alleged bankrupt and the various contractors. They still contend for a construction under which Odell is to work gratuitously even if successful. This position ignores not only the general relationship of the parties and the separate contracts of the individual contractors with Odell (Rec. 169-70, 25 and Petitioners' Brief Appendix) but the common sense inference arising from the fact that attorneys do not often engage in prolonged, arduous litigation gratuitously.

ARGUMENT

For the convenience of the court, from here on we shall discuss the points involved in respondents' brief in the order pursued in our main brief and therein answer the miscellaneous argument of respondents to our points.

Point I.

The court of bankruptcy did not have jurisdiction to enter the orders appealed from.

The controversy was not a bankruptcy controversy but one between strangers to the bankruptcy proceeding.

Seemingly the only basis on which respondents seek to establish a connection between this proceeding and the bankruptcy proceeding is that petitioners were agents for the alleged bankrupt, and that such relationship would confer jurisdiction upon the court on some theory of constructive possession. Inasmuch as the agency controversy and the constructive possession theory are treated specifically in Sub-sections 3 and 4 hereof, discussion of those points is relegated to those appropriate sections.

Although respondents notice *Nixon* v. *Michaels*, 38 Fed. (2d) 420, relied upon in petitioners' brief, they do not seek to impeach its authority, but seek to distinguish it upon two grounds: (1) That the controversy there was between strangers, and (2) that neither the bankrupt nor trustee claimed any of the property. It is submitted that those elements do not distinguish the case. Here too,

the controversy is between strangers; here too, neither bankrupt nor trustee has made any claim to the fund in question. It is true that respondents eventually maneuvered the bankruptcy receiver into a position where he was compelled to make a tentative claim to some of the property and to ask that a portion of the funds be held pending adjudication. However, the first intervening petition specifically alleged that neither the bankrupt nor the receiver had any interest therein. (Rec. 28.) It was not only after the filing of this petition, but a full week after the entry of the so-called "agreed" order that the receiver even suggested any claim. Hence, assuming that this distinction of the *Nixon* case be a substantial one, nevertheless, between the date of filing of the petition and that of the receiver's answer, the situation would be identical with that of the *Nixon* case, the court would be utterly without jurisdiction, and your petitioners are at a loss to understand how the filing of an answer in a proceeding in a court which has no jurisdiction can confer upon that court jurisdiction of that cause—especially in view of the duty of a federal court to dismiss upon its own motion a proceeding over which it has no jurisdiction. (See pages 42 to 47 of Brief for Petitioners.) Of course, it is understood that the alleged claim of the receiver in case at bar is not made to the $48,580 here in litigation.

2.

This litigation constitutes neither a proceeding in bankruptcy nor a controversy arising out of bankruptcy and hence cannot be cognizable by a court of bankruptcy.

Respondents demur to answering what they characterize as "Petitioners' involved argument" (pages 18 to 24 Brief for Petitioners) about Section 23 of the Bankruptcy Act. They say that it is irrelevant, (page 40

their brief) because respondents predicate jurisdiction upon Sub-sections (6) and (7) of Section 2 of the Act. Petitioners concede that it is irrelevant so long as respondents do not seek to predicate jurisdiction upon it. Petitioners sought to rebut every possibility of jurisdiction, including Section 23, because at the time petitioners' brief was written they were not clear as to just what respondents theory of jurisdiction was. They still are not entirely sure. Respondents' disclaimer of any reliance upon Section 23 greatly simplifies the question of jurisdiction inasmuch as *Page* v. *Arkansas Natural Gas Co.*, 53 Fed. (2d) 27; 286 U. S. 269, so confidently relied upon by respondents, was sustained by this court solely upon the basis of Section 23 (b) of the Act. Likewise, the host of other cases cited by respondents to support their inapplicable constructive possession and consent theories were cases decided solely or principally upon the basis of Section 23 (b) of the Act.

Respondents state that they predicate jurisdiction upon Sub-sections (6) and (7) of section 2 of the Act. (Pages 23-24, their brief.) That the present controversy does not involve a "proceeding in bankruptcy" within the purview of Sub-section (6) of Section 2 of the Act is demonstrated by reference to *Bardes* v. *Hawarden Bank*, 178 U. S. 524, and to innumerable other cases of this court, some of which are cited on pages 18 and 19 of Brief for Petitioners. Respondents do not state whether they predicate jurisdiction on Sub-section (6) or Sub-section (7) of Section 2. Petitioners respectfully submit that it is high time that respondents decided.

Respondents, without stating whether they do or whether they do not rely upon Sub-section (7) of Section 2, seek to meet our argument contained on page 19 of our main brief, showing the inapplicability of that sub-section,

by misstating our position, and in typical fashion erecting a man of straw which they proceed to tear down. (Page 40 of their brief.) Petitioners pointed out that the words used in Sub-section (7) obviously refer to "estates of bankrupts". Respondents thereupon state that "petitioners claim that the court has jurisdiction under Sub-section (7) of Section 2 only of property *owned* by the bankrupt * * *". Respondents then conclude "there is no basis for petitioners' contention". Mere reference to Sub-section (7) of Section 2 demonstrates the absurdity of their argument. Petitioners' argument with respect to the inapplicability of either Sub-section (6) or Sub-section (7) of Section 2, or of Section 23, thus stands wholly unimpaired by respondents' answer thereto.

Although, as indicated, respondents predicate jurisdiction either upon Sub-section (6) or (7) of Section 2 as stated in their brief on page 40, they nevertheless state on page 23: "In essence, this is a simple reclamation suit." Either respondents are seeking deliberately to befuddle the issues, or they are laboring under a misapprehension with respect to the nature of reclamation suits, i. e., that jurisdiction of reclamation suits is predicated upon Sub-section (6) or Sub-section (7) of Section 2 of the Act. The fact that reclamation suits are based upon no provision of the statute, but upon the inherent jurisdiction of a court to deal with property within its actual possession, has been settled by this court in *Murphy* v. *Hofman*, 211 U. S. 562, 568-9. Jurisdiction upon the theory of reclamation is dealt with at length on pages 30 to 34 of petitioners' main brief, and will be referred to again in this reply.

3.

The escrowees were not agents for the alleged bankrupt nor were they subject to its control.

It seems strange that although respondents find occasion to refer to Harris and Odell as "agents" of the Tax Service Association thirty miscellaneous times in their brief, they do not once point out any facts on which their assumption is based. They do not point out to the court any allegation in their petition to support such contentions. Of course, there is none, and repetition is a poor substitute for allegations or facts.

The petition does disclose in this particular, as above, that Craig, Harris and Odell were trustees.

Respondents ignore the legal distinction between agents and trustees.

> "* * * In the ordinary agency, the title to any property involved, and usually to all the proceeds of the agency, remains in the principal, and the agent acts in the name of the principal; in a trust the legal title is in the trustee, and he acts in his own name. Agency may in general be revoked at any time; a trust can ordinarily be terminated only by the fulfillment of the purposes of the trust. It is the business of the agent to make contracts binding his principal to third persons; a mere trustee cannot render either the creator of the trust or the beneficiary liable to third persons. * * *"
>
> Corpus Juris, Vol. 2, 425.

> "A trustee is not an agent. * * *"
>
> *Taylor* v. *Davis*, 110 U. S. 330, 334.

The funds were subject to the control only of the three trustees, Craig, Harris and Odell. The alleged bankrupt's name in no way appears in the account or in the letter of authority to the bank. Title to the funds was in the three escrowees and not in the alleged bankrupt.

There was neither actual nor constructive possession within the meaning of such terms as used by the authorities.

Respondents have taken the position that all property in the hands of an agent of the bankrupt is in *custodia legis* even though the property does not belong to the bankrupt. (Their brief, 19, 24, 27.)

Although the dictum of some cases that respondents cite might at first glance suggest such a rule, it is apparent from further observation that those cases are not in point because all of them are "turn-over" and not "reclamation" cases.

Respondents' contention should not be stretched to be applied generally to property which does not belong to the bankrupt but which happens to be in the hands of an agent of the bankrupt. Respondents' contention would give the bankruptcy court jurisdiction over any and all property without limitation upon the mere ground that the property happened to be in the custody of one who acted as an agent for the bankrupt. Surely respondents' contention is neither logic nor law.

Respondents have said (their brief, page 46) that the court had actual custody and control of the escrow fund. If this were the case, why did not the court distribute the funds itself without ordering others to do it?

The answer is clear. Respondents have finally been compelled to admit (page 43, respondents' brief) that because Craig was not an agent of the bankrupt, the bankrupt did not have control of and the power to distribute the fund; that the most that could possibly be ascribed to the bankrupt was power to prevent disbursement. (Even this means of negative control is based upon the false as-

sumption that one or both of the petitioners were agents of the bankrupt.) Certainly this negative control thus assumed to be vicariously conferred on the court, would amount to no more than the restraining power which the court had anyway, and could not possibly constitute any basis for jurisdiction.

These petitioners pointed out in their main brief that the law is well settled that even for the purpose of jurisdiction in "turn-over" proceedings the agent must hold the property unconditionally subject to the sole order of the bankrupt.

Buss v. *Long Island Storage Warehouse*, 64 Fed. (2d), 338, 340.

Sproul v. *Levin*, 88 Fed. (2d), 866.

To this legal principle, respondents are silent.

In answer to petitioners' contention that the funds here in litigation were merely a chose in action, and hence not property susceptible to being in possession, respondents cite a list of cases, and Remington on Bankruptcy on page 44 of their brief, all of which are either not in point, or do not support their position, *e. g.*, several of the cases specifically hold that the property sought to be reached was not a chose in action; in other cases respondents have overlooked the distinction between jurisdiction to determine the relative rights of the bankrupt and some other person to enforce a chose in action, and the actual jurisdiction to enforce the chose in action itself against the third party debtor.

5.

Mere constructive possession is not sufficient to confer upon the bankruptcy court jurisdiction over a reclamation suit.

Respondents do not answer but seek to evade this portion of petitioners' argument. They attempt to weaken the effect of *Murphy* v. *Hofman*, 211 U. S. 562, 568-9, by pointing out that there was actual possession in that case, and suggest that the court "was not attempting to emphasize *actual* possession or distinguish between actual and constructive possession". From the passage quoted from that case on page 33 of our main brief there can be no doubt that it is actual possession, that it is the taking of property "into its possession, through its officers" which brings "into play" the principle of reclamation.

Even assuming *arguendo* that one or both of the petitioners was an agent for the bankrupt, it is clear that there can be no actual possession nor possession at all other than in a constructive, purely fictitious sense—certainly not in the sense that the term "possession" is used in *Murphy* v. *Hofman*. Particularly is this true in view of respondents' admission that the bankrupt had no control over Craig and was powerless to disburse or control the funds other than in a purely negative sense, i. e., it might prevent their disbursement.

It will be recalled, as indicated in Sub-section 2 *supra* that respondents still are not certain whether they seek to sustain jurisdiction upon the basis of Sub-sections (6) or (7) of Section 2 of the Act, or upon the theory of a reclamation suit. Although respondents state (page 23) that this is a "simple reclamation" suit, on page 45 they use the following language:

> "If a reclamation suit means reclaiming tangible property in the manual possession of the Receiver

> or trustee, the instant case was *not a reclamation suit*. Respondents were asking that a bank deposit in the custody and control of the bankrupt be turned over to them. Fundamentally, therefore, this was a reclamation suit just as were *numerous other cases* where manual possession of tangible property was not in the Receiver or the trustee, but where it was held that the bankruptcy court had jurisdiction of the bank deposit or Escrow Fund or chose in action for the purpose of determining to whom it belonged and of returning it to its rightful owner. * * *" (Italics ours.)

Respondents do not cite any of the "numerous other cases", and your petitioners are convinced that there are none; at least after exhaustive search, they have been unable to find any. Aside from *Murphy* v. *Hofman*, just discussed, respondents cite only one reclamation suit in their entire brief. This is the case of *Denton* v. *Gurnett*, (C. C. A. 8th Circuit) 69 Fed. (2) 750. This case is perfectly in accord with our argument and is misstated by respondents on page 29 of their brief. Respondents state with respect to that case that "at the time the petition was filed, the stock was not in the possession of the bankrupt but was pledged by it." In fact, the reclamation suit there was brought to recover 270 shares of utility stock. At the time of the filing of the *petition in bankruptcy*, 100 shares were in the bankrupt's "strong-box" and were never out of the possession of the bankrupt or receiver. The other 170 shares were at the time of the filing of the petition in bankruptcy in the hands of a pledgee along with other collateral to secure a debt of the bankrupt. Before the filing of the *reclamation petition*, the pledgee had sold some of the other collateral, had satisfied the debt, and had returned the 170 shares of utility stock to the receiver. Thus, all of the stock reclaimed in that suit was in the actual physical possession of the receiver at the time the reclamation

proceedings were commenced. The Circuit Court of Appeals in that case says on page 751:

> "These proceedings were instituted while the Utilities stock was in the possession of the receiver in bankruptcy."

6.

The petitioners did not in fact consent to the jurisdiction of the bankruptcy court.

Respondents have not met petitioners' argument upon this point except to characterize it as "frivolous", and except by restating and misstating it in facetious form, e. g., the first paragraph of their Point "C". (Page 53-6, respondents' brief.) Petitioners certainly did not intend that argument as frivolous, nor do they think it is. Petitioners, trustees, found themselves in a position where their beneficiaries were likely to lose a large sum of money, and where they themselves might be liable for such loss. A court wholly without jurisdiction was nevertheless entertaining a proceeding which threatened to prevent your petitioners from averting this loss. The pressure of such a situation does not appeal to your petitioners as being frivolous. We call attention to the language used by respondents themselves in their conclusion on page 69 of their brief:

> "* * *. When petitioners were confronted by the possibility that their refusal to turn over respondents' money to respondents might subject them to a personal liability of $100,000, they consented to the District Court's taking jurisdiction of the Escrow Fund and distributing it. * * *."

7.

Consent cannot confer jurisdiction of the subject matter, i. e., jurisdiction on the bankruptcy court of a controversy between strangers to the bankruptcy proceeding.

Respondents in their brief (page 56) seem to make light of the fact that jurisdiction in all federal courts must appear from the allegations of the party invoking that jurisdiction and that no substitute or later developments will answer in its stead, and seem to feel that at all events the bankruptcy courts are not subject to such limitations.

Both of respondents' intervening petitions are fatally defective in that they failed not only to state a cause of action cognizable in any court, but also in that they failed to allege any grounds whatsoever of federal jurisdiction.

Respondents have asserted that necessary jurisdictional allegations were present in their intervening petitions. A reading of these petitions conclusively shows an absence of any allegations of jurisdiction. Respondents resort to "judicial notice" as a substitute for jurisdictional requirements but they quote no authority. As heretofore pointed out it was the duty of the court to dismiss summarily the intervening petition even though the defect had not been called specially to its attention.

Respondents contend (page 48-53, their brief) that parties cannot appeal from an order to which they have consented. The petitioners here have not and are not appealing from the so-called consent order of May 27th. Petitioners did not consent to the orders from which they are appealing but objected to the jurisdiction immediately upon the filing of the intervening petition on which those orders were entered.

The *Swift* and other cases respondents have cited in this regard are cases in which the very orders cons' ted to were appealed from. Not so in case at bar.

In all respondents' cases the court had jurisdiction of the subject matter. In the *McGowan* case (237 U. S. 285) the only dispute was with respect to whether or not equity jurisdiction could be waived when there was an adequate remedy at law. That issue is not involved in the case at bar. If respondents' contention is correct, i. e., that jurisdiction can be conferred by consent on courts of bankruptcy, then we nullify all of the limitations upon the jurisdiction of the federal courts, because parties could bring any litigation whatever into the federal courts by merely intervening in a bankruptcy proceeding.

Point II.

The orders appealed from deprived petitioners of property without any opportunity whatever to be heard on the merits of the issues.

It has not been denied that petitioners were required to sign summarily a check for $48,580 without protection, indemnification or hearing on the merits of the issue despite the fact that promptly upon the overruling of petitioners' motion to strike, an immediate request was made for hearing on the merits and that opportunity summarily denied them. (Rec. 96.)

There is a fundamental fallacy by both the respondents and the Circuit Court of Appeals in the treatment of denial of the right to be heard on the merits. The refusal to permit petitioners here to be heard on the merits is sought to be justified, if not solely, principally, upon the ground that if such right had been accorded them they would not have been able to show any facts

constituting a substantial interest or defense. This, of course, is begging the issue. To sustain the denial of a right to plead to the merits the court must assume that petitioners could file a good plea to the merits and must take the bald position that under the circumstances of this case petitioners have been rightly denied opportunity to interpose such valid plea.

The only ground on which the denial of the right to be heard on the merits can ever be justified is that the parties asserting such right have waived it. That the parties here did not waive such right is clear.

Respondents (page 67, their brief) attempt to create the erroneous impression that petitioners did not demand the right to be heard on the merits at the first opportunity after determination of the question of jurisdiction. The court ruled on jurisdiction for the first time July 12, 1937. Instantly leave was asked to plead to the merits but summarily denied.

Although as indicated in objecting to denial of the right to be heard on the merits, it is not incumbent on petitioners to establish the interest that would have been shown had such hearing been accorded, yet petitioners believe that the general nature of such interest is apparent even from the *ex parte* record. There are two general types of interest here involved:

First, the liability of the trustees by reason of the terms of the trust to the beneficiary thereof. One of the principal objects of the trust may readily be inferred as payment for legal services rendered in the contractor's case and in which this escrow fund arose. Thus, Odell as attorney and as an individual and aside from his capacity of trustee, was a beneficiary of the trust.

Second, escrow trustees, Craig, Harris and Odell could not shirk their part of the responsibility for the

proper distribution of funds entrusted to their care as trustees. When the intervening petition was filed, expenses had to be incurred by the escrow trustees in the proper handling of their trust and the protection of the rights of the beneficiaries thereof. It was incumbent upon those trustees to fulfill their obligations to all the contractors they represented in the escrow fund. The trustees had obligations not only to the contractors who were parties to the intervening petitions, but as well to the contractors not parties to the intervening petitions. Trustee Harris had to engage counsel to represent him. The payment for these expenses were as much the duties of the escrow trustees as was the distribution of the balance to the contractors. See: *Taylor* v. *Davis*, 110 U. S. 330, 338.

Point III.

The Circuit Court of Appeals and the trial court committed further errors requiring reversal.

1.

The court erred in entertaining an involuntary petition against a corporation organized not for profit.

Respondents say:

> "* * * the question of whether the bankrupt was or was not a business corporation is a question of jurisdiction of the person, i.e., the bankrupt, and not of the subject matter." (Respondents' brief, page 68.)

It is obvious that respondents' attorney is laboring under a misapprehension. If the alleged bankrupt is not a party susceptible of being adjudicated under the act, there can be no subject matter with respect to it cognizable by a court of bankruptcy. The question is not one of service

upon the bankrupt, but of jurisdiction of the alleged bankruptcy; hence, jurisdiction of the subject matter.

2.

The court erred in determining an intervening controversy when its jurisdiction over the bankruptcy proceeding was in issue and undetermined.

Respondents seek to meet this point by arguing (pages 36-37 their brief) that a court of bankruptcy has *jurisdiction* under some exceptional circumstances to determine collateral controversies prior to adjudication. Petitioners' argument on this point is not directed to the question of jurisdiction, but rather to the question of whether or not the court abused its discretion.

3.

The court disregarded Equity Rule 66 and denied petitioners sufficient time to file exceptions to the Special Master's report.

Respondents contend that Equity Rule 66 is not violated by reducing the twenty days specifically provided for therein to a mere two days even though such reduction of time was made over strenuous objection of petitioners' counsel even if it be assumed the Equity Rule is to be applied only by "analogy", the abuse of discretion is evident.

CONCLUSION.

Now after the filing of all briefs petitioners believe it conclusively appears that:

Neither of the intervening petitions stated a cause of action cognizable in any federal court and the same should have been dismissed on the court's own motion.

The controversy was one between utter strangers to the bankruptcy proceeding.

Petitioners were not agents but were trustees.

Neither the alleged bankrupt nor the court had possession or custody, actual or constructive, of the funds in question.

Petitioners did not, and could not, consent to bankruptcy court jurisdiction over the collateral controversy.

Petitioners were deprived of property without due process of law—an opportunity to be heard on the merits.

The Bankruptcy Act does not extend to a "not for profit" corporation.

Jurisdiction over the collateral matter was assumed by the court before determining whether it had jurisdiction of the subject matter of the alleged bankruptcy.

The court abused its discretion by reducing the time to file objections from the twenty days provided for by rule to two days.

The decisions of the lower courts should be reversed.

Respectfully submitted,

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